

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2008 MAY 29 P 3:49

BY RONALD R. CARPENTIER

CLERK

SUPREME COURT NO. 80572-5

Court of Appeals No. 57523-6-I

FILED
MAY 29 2008
CLERK OF SUPREME COURT
STATE OF WASHINGTON

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MARTIN SCHNALL, et al.,

Respondents,

v.

AT&T WIRELESS SERVICES, INC.,

Petitioner.

**SUPPLEMENTAL BRIEF OF PETITIONER AT&T WIRELESS
SERVICES, INC.**

Michael E. Kipling, WSBA #7677
Kipling Law Group, PLLC
3601 Fremont Ave N, Suite 414
Seattle, Washington 98103
(206) 545-0345

Counsel for Petitioner
AT&T Wireless Services, Inc.

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	STATEMENT OF THE CASE.....	1
III.	ARGUMENT	4
	A. <i>Indoor Billboard</i> Requires Reversal of the Court Of Appeals' Opinion	4
	1. The Court of Appeals relied on a legal standard that this Court expressly rejected in <i>Indoor Billboard</i>	4
	2. There is no basis to distinguish <i>Indoor</i> <i>Billboard</i> in a way that changes the Court's conclusion regarding CPA causation.	8
	3. Federal preemption is a critical factor in this case, which provides further support for the trial court's decision.....	11
	B. Recent Developments in the <i>Randolph</i> Case Further Undermine the COA Opinion	15
IV.	CONCLUSION.....	19

TABLE OF AUTHORITIES

Cases

<i>Amchem Products, Inc. v. Windsor</i> , 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997).....	11
<i>Arkansas Louisiana Gas Co. v. Hall</i> , 453 U.S. 571, 101 S. Ct. 2925, 69 L. Ed. 2d 856 (1981).....	16
<i>Barbara's Sales, Inc. v. Intel Corporation</i> , 879 N.E. 2d 910 (Ill. 2007)	19, 20
<i>Capital Cities Cable, Inc. v. Crisp</i> , 467 U.S. 691, 104 S. Ct. 2694, 81 L. Ed. 2d 580 (1984).....	15
<i>City of Fircrest v. Jensen</i> , 158 Wn. 2d 384, 143 P.3d 776 (2006).....	11
<i>Deposit Guaranty Nat. Bank v. Roper</i> , 445 U.S. 326, 100 S. Ct. 1166, 632 L. Ed. 2d 427 (1980).....	11
<i>Fidelity Federal Sav. and Loan Ass'n v. de la Cuesta</i> , 458 U.S. 141, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982).....	15
<i>General Telephone Co. of the Southwest v. Falcon</i> , 457 U.S. 147, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982).....	6
<i>In re Bridgestone/Firestone, Inc. Tire Prods. Liab. Litig.</i> , 288 F.3d 1012 (7 th Cir. 2002)	18
<i>Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.</i> , 162 Wn. 2d 59 (2007).....	passim
<i>Laffey v. Northwest Airlines, Inc.</i> , 567 F.2d 429 (D.C. Cir. 1976).....	11
<i>Louisiana Public Service Com'n v. F.C.C.</i> , 476 U.S. 355, 106 S. Ct. 1890, 90 L. Ed. 2d 369 (1986).....	15
<i>Miller v. Farmer Bros. Co.</i> , 115 Wn. App. 815, 64 P.3d 49 (2003).....	6, 8
<i>Mirkin v. Wasserman</i> , 5 Cal. 4 th 1082, 23 Cal. Rptr. 2d 101 (1993)	10
<i>Morris v. International Yogurt Co.</i> , 107 Wn. 2d 314, 729 P.2d 33 (1986).....	9, 10
<i>Oda v. State</i> , 111 Wn. App. 79, 44 P.3d 8 (2002)	6, 8

<i>Pickett v. Holland America Line-Westours, Inc.</i> , 101 Wn. App. 901, 6 P.3d 63 (2000)	1, 4, 14
<i>San Diego Bldg. Trades Council v. Garmon</i> , 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959)	16
<i>Schmidt v. Cornerstone Investments, Inc.</i> , 115 Wn.2d 148, 795 P.2d 1143 (1990)	16
<i>Vonage Holdings Corp. v. F.C.C.</i> , 498 F.3d 1232 (D.C. Cir. 2007)	13
<i>Washington State Physicians Ins. Exchange & Ass'n v.</i> <i>Fisons Corp.</i> , 122 Wn. 2d 299, 858 P.2d 1054 (1993)	8, 9, 17

Statutes

47 C.F.R. § 54.712	12, 13
47 U.S.C. § 254	11, 12
47 U.S.C. § 254(d)	12
47 U.S.C. § 254(f)	14

Other Authorities

16 F.C.C.R. 9892, ¶ 1 (2001)	12
<i>Further Notice of Proposed Rulemaking and Report and Order</i> , 17 F.C.C.R. 3752, ¶ 6 (2002)	12
<i>In The Matter of Federal-State Joint Board on Universal Service</i> , 12 F.C.C.R. 8776, ¶ 1 (1997)	11, 12, 13

I. INTRODUCTION

This Court's recent decision in *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn. 2d 59 (2007) compels reversal of the Court of Appeals Opinion, *Schnall v. AT&T Wireless Services, Inc.*, 139 Wn. App. 280, 161 P.3d 395 (Div. 1, 2007) ("COA Opinion") in this matter. *Indoor Billboard* rejects the Court of Appeals' rationale regarding the proof of causation required under the Washington State Consumer Protection Act ("CPA") and overrules the specific precedent on which it relied (*Pickett v. Holland America Line-Westours, Inc.*, 101 Wn. App. 901, 920, 6 P.3d 63 (2000) ("*Pickett P*"). *Indoor Billboard* confirms that the proximate cause standard that the trial court in this matter applied was, in fact, the proper standard.

II. STATEMENT OF THE CASE

A detailed statement of the evidentiary record and the procedural history of this matter is contained in the Petitioner's Brief to the Court of Appeals and its Petition for Review filed with this Court. That detailed discussion will not be repeated here; rather, this Supplemental Brief discusses matters that have not previously been covered.

Since the COA Opinion was issued, there have been at least two significant developments that affect this Petition for Review. First, this Court's decision in *Indoor Billboard* makes it clear that the Court of Appeals applied the wrong legal standard in reversing the trial court's Order Denying Class Certification. For this reason alone, reversal is required. See discussion, *infra*.

The second significant development involves related litigation in California state court, *Randolph and Girard v. AT&T Wireless Services, Inc.*, Alameda County Docket No. RG05193855 ("*Randolph*"). Plaintiffs' counsel in the matter before this Court represent an overlapping and conflicting class in the *Randolph* case.¹ Following the trial court's denial of his Motion for Class Certification, John Girard (formerly a Named Plaintiff in this case) took a voluntary dismissal of his claims. Then, represented by the same lawyers, Mr. Girard filed the same claims against the same defendant in California state court, purporting to represent a class of California subscribers.

In *Randolph*, plaintiffs claim that the statutory deception claims of the class are governed by California law, notwithstanding their arguments in this matter that Washington's CPA should apply to the claims of all subscribers, including the California members of the putative nationwide class sought here. Recently, the California state court in *Randolph* certified a class of California subscribers to bring California state law claims and appointed Messrs. Breskin, Johnson and Houck (Plaintiffs' counsel herein) to represent the class. *Id.* Because of the inherent conflict that arises when an attorney attempts to represent overlapping and/or conflicting classes in different matters, Plaintiffs' counsel made the following representations to the California court in *Randolph*:

Plaintiffs' Washington counsel [i.e., Messrs. Breskin, Johnson and Houck] will take the following steps to

¹ See Order Granting Approval of Form of Class Notice (filed April 18, 2008) (copy attached as Exhibit A).

ensure that they do not represent a class of AWS's California consumers in *Schnall*: (1) they will formally withdraw as counsel for any named plaintiff in *Schnall* who is in the California class; (2) they will seek to amend the pleadings in *Schnall* as soon as reasonably possible to state that the nationwide class does not include AWS's California customers; (3) they will not seek to certify a class in *Schnall* that includes AWS's California customers; and (4) they will not seek in *Schnall* to settle or otherwise resolve the claims of AWS' California customers.

Plaintiffs' Reply Brief in Support of Plaintiffs' Motion for Class Certification (filed April 27, 2007), p. 15, ll. 9 – 16 (copy attached as Exhibit B).² Thus, the relief Plaintiffs request from the Court here—certification of a nationwide class and appointment of class counsel to represent that class—is no longer available to Plaintiffs.³

For the reasons discussed below, Petitioners respectfully suggest that the most appropriate action for this Court is to reverse the COA Opinion and remand the case to the trial court for further proceedings.

² Petitioner AT&T Wireless Services, Inc. requests this Court to take judicial notice, pursuant to ER 201(b), of counsel's role in both *Schnall* and *Randolph* and counsel's statements to the court in *Randolph*.

³ The fact that Plaintiffs' counsel allege that California law applies to the claims in *Randolph*, contrary to their claims here, undermines their argument that Washington's Consumer Protection Act should apply to the nationwide claims herein. These developments in *Randolph* also raise other issues that affect the CR 23 analysis in *Schnall*. See discussion, *infra*.

III. ARGUMENT

A. *Indoor Billboard* Requires Reversal of the Court Of Appeals' Opinion

1. The Court of Appeals relied on a legal standard that this Court expressly rejected in *Indoor Billboard*.

The Court of Appeals relied on its earlier opinion in *Pickett I* (101 Wn. App. at 920) in holding that plaintiffs “cannot be required to prove that they would not have purchased wireless service had they known about [the UCC].” 139 Wn. App. at 292. Instead, the Court of Appeals concluded, “[H]ere, as in *Pickett I*, it is enough to establish causation that they purchased the service and AT&T charged them a fee that was not a tax or government surcharge.”⁴ This very same argument was rejected by this Court in *Indoor Billboard*:

Indoor Billboard argues that *Hangman Ridge* established that a plaintiff need only show that it lost money to show causation, relying again on *Pickett I*. However, as we have already noted, this Court subsequently reversed *Pickett I* on other grounds, finding *Pickett I*'s analysis of causation suspect. . . . Although we agree the CPA is to be liberally construed, *Pickett I* carries this construction too far. Therefore, we reject Indoor Billboard's argument that causation may be established merely by a showing that money was lost.

⁴ *Id.* The Court of Appeals also ignored the fact that, because of federal preemption, a state court is *not* free to decide whether the UCC is an appropriate “tax or government surcharge” that may be passed through to wireless subscribers. The FCC has already determined that wireless telecommunications providers may pass through to subscribers their USF recoveries in the form of a separate line item on subscribers' bills. See discussion, *infra*. This FCC decision preempts any finding by a state court that contradicts it.

162 Wn. 2d at 81. To the contrary, this Court found that in order to prove causation under the CPA, a plaintiff must establish that her injury was proximately caused by Defendants' allegedly deceptive act. *Id.* at 82 - 84.

“‘Proximate cause’ is defined in WPI 310.07 as a cause which in direct sequence [unbroken by any new independent cause] produces the injury complained of *and without which such injury would not have happened.*” *Id.* at 82 (internal quotations omitted; emphasis added). Proximate cause therefore requires proof of “but-for” causation (WPI 15.01), which is an essential element of the causal link that a CPA plaintiff must prove. *Id.* “Applying WPI 15.01 to the causation analysis for a CPA claim, a plaintiff would have to establish that but for the defendant’s unfair or deceptive act or practice the plaintiff’s injury would not have occurred.” *Id.*

The proximate cause standard in *Indoor Billboard* is precisely the standard the trial court applied in denying class certification of the CPA claims. Thus, the trial court held that “proof of causation is an essential element of a CPA action” and went on to apply a but-for causation test to the CPA claims here. CP 421 – 422. Although Plaintiffs (and the Court of Appeals) mischaracterized the decision, the trial court never found that “actual reliance” was required for every CPA claim. Indeed, the term “reliance” does not appear in the Memorandum Opinion Denying Class Certification. *See* CP 417 – 422. The trial court simply concluded, as this Court has now confirmed, that a CPA plaintiff is required to show “a causal link” between the alleged violation and her injury and that a

necessary part of this “causal link” is proof that the injury would not have occurred but for the alleged deceptive act. CP 421 – 422.

Having chosen the appropriate legal standard, the trial court then undertook a rigorous analysis of the claims, the evidence and the elements of Rule 23 to determine whether Plaintiffs’ claims could fairly be tried on a class-wide basis. This, too, was entirely appropriate. “[A]ctual, not presumed, conformance with Rule 23(a) [is] indispensable.” *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 160-61, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982); *Oda v. State*, 111 Wn. App. 79, 92, 44 P.3d 8 (2002); *Miller v. Farmer Bros. Co.*, 115 Wn. App. 815, 820, 64 P.3d 49 (2003). The trial judge reviewed an extensive evidentiary record, in light of his knowledge of the claims and defenses in the case. The record showed that, contrary to Plaintiffs’ arguments at the Court of Appeals, a vast amount of accurate information regarding the UCC was available to subscribers and potential subscribers from AWS itself and from other sources. These sources included information in the AWS Subscriber Agreements, itemized monthly bills that listed the UCC as a separate charge, periodic billing disclosures, detailed information from AWS’ Customer Care and on its website that described the UCC, and disclosures in AWS’ advertising and other promotional information. Brief of Respondent and Cross-Appellant, pp. 8 – 14.

As to the issue of but-for causation, perhaps the most telling fact is that the Named Plaintiffs and the vast majority of putative class members chose to renew their agreements with AWS, notwithstanding that the UCC

had been separately itemized on each month's bill that they received from AWS during the initial term of their contract. Petition for Review, p. 9, n.9. Having chosen to enter into another agreement at a time when she was undeniably on notice that she would be required to pay the UCC, it is difficult to understand how a claimant could establish that she would not have entered into the original agreement had she known of the UCC. At the very least, it is clear in this context that the trier of fact would need to consider the individual circumstances of each claimant in order to evaluate her "proof" of but-for causation. It cannot simply be assumed that *no* subscriber would have entered into a contract with AWS had they been fully aware of the UCC.

In light of this record, the trial judge acted well within his discretion when he found that "[i]n the context of this case, each plaintiff must show that AWS' alleged misrepresentation about the plaintiff's obligation to pay a UCC affected the plaintiff's decision to choose AWS as a wireless provider. This proof must necessarily be individual for each potential class member." CP 422. The trial court's decision whether to certify a class is a matter within his discretion and may not be overturned unless that discretion is abused. *Oda*, 111 Wn. App. at 90; *Miller*, 115 Wn. App. at 820.

2. **There is no basis to distinguish *Indoor Billboard* in a way that changes the Court's conclusion regarding CPA causation.**

a. **The fact that Plaintiffs now argue that theirs is a claim of omission does not lead to a different legal standard.**

Plaintiffs now claim that this case involves a failure to disclose, rather than affirmative misrepresentations.⁵ But they cannot distinguish *Indoor Billboard* on the ground that it was a decision based on alleged affirmative misrepresentation. This argument fails for several reasons. First, this Court's conclusion in *Indoor Billboard* that proximate cause is required to prove the "causal link" in a CPA claim applies to *all* claims, regardless of whether the claim sounds in affirmative misrepresentation or omission. Indeed, one of the principal cases on which this Court relied, *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn. 2d 299, 858 P.2d 1054 (1993), involved nondisclosure ("failure to warn") rather than affirmative misrepresentation. 162 Wn. 2d at 83. "*Fisons* clearly acknowledged that a proximate cause jury instruction was appropriate with respect to the causation element of a CPA claim." *Id.*

Morris v. International Yogurt Co., 107 Wn. 2d 314, 729 P.2d 33 (1986) does not support a different result.⁶ Indeed, the decision in *Indoor*

⁵ In fact, the allegations in this case rely at least as much on affirmative statements by defendants as they do on alleged omissions. See CP 185 – 195 (*cf.*, e.g., ¶¶ 5.12.a. – 5.12.c. with ¶¶ 5.12.d. – 5.12.f., 5.12.h.).

⁶ As a threshold matter, the theory on which *Morris* is premised requires proof that plaintiff was not aware of the allegedly omitted facts, that defendants had a duty to disclose the omitted facts but did not and that plaintiff relied on a statement from which material facts were omitted. *Amicus Curiae Memorandum of the Chamber of Commerce*

Billboard undercuts the rationale on which *Morris* was premised. Even if we assume for the sake of argument that it might be difficult for a plaintiff to prove *specific reliance* on a fact that was not disclosed, *Indoor Billboard* merely requires that plaintiffs show *proximate causation*. Proof of proximate causation in a case of alleged omission is essentially no different than it is in a case of alleged affirmative misrepresentation. In either case, the plaintiff can establish causation by proof that he would not have suffered an injury had “full disclosure” been made. This proof is no more difficult in a case of omitted facts than in a case of affirmative misrepresentation. “[I]t is not logically impossible to prove reliance on an omission. One need only prove that, had the omitted information been disclosed, one would have been aware of it and behaved differently.” *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1093, 23 Cal. Rptr. 2d 101 (1993).

At most, *Morris* holds that it may be appropriate in *certain* non-disclosure cases arising under the Franchise Act to shift the burden of proof by applying a “rebuttable presumption” of reliance. 107 Wn. 2d at 328-29. But, while shifting the burden of proof to defendant might affect the outcome of a dispositive motion, as in *Morris*, it should not affect the CR 23 analysis. Regardless of whether plaintiffs have an affirmative burden or defendants have the burden of rebutting a presumption of causation, the trier of fact must have access to the evidence necessary to a fair resolution of the claims. If, as here, the key evidence as to causation

of the *United States of America*, p. 2, n.1. None of these predicate facts is established as to the Named Plaintiffs here, let alone as to the entire class.

is individualized, there is no way to try the CPA claims fairly in a class-wide trial, regardless of who bears the burden of proof. By presuming causation in favor of unnamed class members and denying defendants a realistic opportunity to present evidence to the contrary, the court would in effect create an irrebuttable presumption that not one class member would have incurred the obligation to pay the UCC if different information had been provided at the outset. In the context of this particular case, at least, that cannot be done without eliminating the “causal link” that this Court has held is essential to a private CPA claim.

b. This case is not distinguishable from *Indoor Billboard* because the issue arises in the context of a CR 23 motion.

The fact that the causation issue arises here in the context of a class certification motion does not change the standard for proof of the underlying CPA claim. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997); *see also Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 472 (D.C. Cir. 1976). Class actions are procedural devices only; the law regarding the underlying claims is not changed by CR 23. *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 332, 100 S. Ct. 1166, 632 L. Ed. 2d 427 (1980) (“[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.”). Indeed, this Court’s authority to adopt rules such as CR 23 is limited to procedural issues. *City of Fircrest v. Jensen*, 158 Wn. 2d 384, 394, 143 P.3d 776 (2006). Any change in the substantive law regarding the CPA cannot come from the court, but must come from the

Legislature. *Id.*

3. **Federal preemption is a critical factor in this case, which provides further support for the trial court's decision.**
 - a. **The UCC was created by and is regulated by the federal government.**

There is one important distinction between this case and *Indoor Billboard*, but it does not support the COA Opinion. Unlike in *Indoor Billboard*, federal preemption issues greatly limit the claims Plaintiffs may assert here. This distinction provides yet another reason that the COA Opinion should be reversed.

Whereas the plaintiff in *Indoor Billboard* alleged that the “PICC” charge at issue in that case was not regulated or required by the government, the UCC is a charge created, authorized, and regulated by the Federal Communications Commission (“FCC”). The UCC is the means by which AWS passes through to its customers its mandatory “contributions” to the Federal Universal Service Fund (“USF”), which fund was created by Congress in the Telecommunications Act of 1996 and is administered by the FCC. *See* 47 U.S.C. § 254; *In The Matter of Federal-State Joint Board on Universal Service*, 12 F.C.C.R. 8776, ¶ 1 (1997) (“Universal Service Order”). It cannot be disputed that contributions to the Universal Service Fund are mandatory for telecommunications carriers. “[T]he [Universal Service] Act mandates contributions from ‘[e]very telecommunications carrier that provides

interstate telecommunications services.”” *Vonage Holdings Corp. v. F.C.C.*, 498 F.3d 1232 (D.C. Cir. 2007), quoting 47 U.S.C. § 254(d).

Moreover, the FCC created USF pass-through charges (such as the UCC) so that telecommunications carriers might recover their USF contributions from telephone subscribers. FCC regulations reveal the origin of such pass-through charges:

Federal universal service contribution costs may be recovered through interstate telecommunications-related charges to end users. If a telecommunications carrier chooses to recover its federal universal service contribution through a line item on a customer’s bill the amount of the federal universal service line-item charge may not exceed the interstate telecommunications portion of that customer’s bill times the relevant contribution factor.

47 C.F.R. § 54.712.

The FCC regulates the amount of the USF pass-through charges and actively monitors carriers’ recovery of the USF charges. *Universal Service Order*, 12 F.C.C.R. 8776, ¶¶ 843 – 50; *see also* 16 F.C.C.R. 9892, ¶ 1 (2001) (Notice of Proposed Rulemaking to consider “both the manner in which the Commission assesses carrier contributions to the universal service fund and the manner in which carriers may recover those costs from their customers.”) The FCC has recognized that its authority involves “two distinct but related components: the assessment of contributions on telecommunications providers; and *the recovery of contribution payments by providers from their customers.*”⁷ Pursuant to Congressional

⁷ *Further Notice of Proposed Rulemaking and Report and Order*, 17 F.C.C.R. 3752, ¶ 6 (2002) (emphasis added); *see also* 47 U.S.C. §§ 254(b), (d).

direction in the Telecommunications Act of 1996 “to take the steps necessary to establish the support mechanisms” for the USF, in 1997 the FCC issued its Universal Service Order, which established a system whereby carriers are required to contribute to the USF based on their historic “end-user telecommunications revenues.”⁸

The FCC has emphasized its authority to ensure that carrier recovery practices are “reasonable” and nondiscriminatory under Sections 201 and 202, as well as its responsibilities under Section 254. *Id.*, ¶ 7. Thus, unlike in *Indoor Billboard*, the charge at issue here was created by and is regulated by the federal government.⁹

b. Because of federal preemption, the only CPA claims that may be litigated in state court are claims based on alleged deception.

Because the FCC has ruled specifically that wireless carriers such as AWS may use a separate line item charge on subscribers’ bills to pass through their USF contributions, federal law preempts any argument by Plaintiffs that it is unfair or illegal to pass through the USF contribution as a line item charge. *Louisiana Public Service Com’n v. F.C.C.*, 476 U.S. 355, 368-69, 106 S. Ct. 1890, 90 L. Ed. 2d 369 (1986); *Fidelity Federal Sav. and Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 152-53, 102 S. Ct.

⁸ *Universal Service Order*, 12 F.C.C.R. 8776, ¶¶ 843-44. This means that the amount of the mandatory “contributions” to the USF by wireless carriers are based on the revenues they collect from their customers.

⁹ This case also differs significantly from *Pickett*, in which plaintiffs alleged that the “port charges” at issue were described as a pass-through of government charges when they were not. Here, the UCC is a permitted pass-through of federally-mandated contributions to the USF. 47 C.F.R. § 54.712.

3014, 73 L. Ed. 2d 664 (1982); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 698-99, 104 S. Ct. 2694, 81 L. Ed. 2d 580 (1984). Congress has expressly indicated that states may not interfere with the Commission's authority to regulate the Universal Service Fund. 47 U.S.C. § 254(f) ("A State may adopt regulations *not inconsistent* with the Commission's rules to preserve and advance universal service.") (emphasis added).

It is well-established that federal preemption applies to state courts as well as to state legislatures and administrative agencies. The U.S. Supreme Court has long recognized that "regulation can be as effectively exerted through an award of damages" or other judicial relief as through legislative or administrative action. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959); *see also Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578-79, 101 S. Ct. 2925, 69 L. Ed. 2d 856 (1981). In light of this authority, Plaintiffs have conceded they do not challenge the fact that AWS recovered its USF contributions through a separate line item on the bill. Instead, they purport to challenge only what they claim is deception in the way the UCC was presented to consumers: "Plaintiff Schnall does not attack the reasonableness of AWS's practice of charging a 'Universal Connectivity Charge.' He challenges only nondisclosure (and misleading disclosure) of the practice." CP 1126.

Under Washington law, Plaintiffs must show a causal link between the alleged violation and their injury. "[T]he causal link must exist between the *deceptive act* . . . and the *injury suffered*." *Schmidt v.*

Cornerstone Investments, Inc., 115 Wn.2d 148, 167, 795 P.2d 1143 (1990) (emphasis in original); *see also Fisons*, 122 Wn. 2d at 314. Plaintiffs have acknowledged that there is nothing improper or unreasonable about the UCC; the only violation they allege is based in deception. Thus, as to each claimant, Plaintiffs must establish that, “but for” alleged deception in the way the UCC was represented to him, he would not have incurred the obligation to pay the UCC. As the trial court found, this means that Plaintiffs have to show that their decision to choose AWS as a wireless provider was affected by AWS’ alleged misrepresentation about the Plaintiffs’ obligation to pay a UCC. CP 422. For all the reasons discussed herein, such proof is necessarily individual in this context.

B. Recent Developments in the *Randolph* Case Further Undermine the COA Opinion

Plaintiffs apparently will ask this Court to direct the trial court to certify a nationwide class and to apply Washington’s CPA to the claims of all class members, but that relief is no longer available because of recent actions by Plaintiffs’ counsel and former Named Plaintiff Girard. As discussed above, Plaintiffs’ counsel and Mr. Girard have filed the same UCC claims in California state court on behalf of a California class. In that action, contrary to their arguments here, they assert that California law applies to the claims. *See, e.g.*, Exh. B, pp. 4 – 5, 7 - 8. Plaintiffs’ counsel also have declared that they will not seek to certify a class in this matter that includes the California subscribers. *Id.*, p. 15. These developments affect the current Petition in several important respects.

As to the choice of law issue, Plaintiffs' blatant forum-shopping illustrates several of the key problems with the COA Opinion. The Opinion concludes that claims against Washington companies should be governed by Washington law, even where the claims are made by out-of-state plaintiffs and are based on out-of-state transactions. 139 Wn. App. at 294. The Court of Appeals failed to consider the interests of other sovereign states, which will understandably be reluctant to allow Washington to dictate the law that governs the claims of their citizens. *See Amicus Curiae Memorandum of the Chamber of Commerce*, p. 9, citing *In re Bridgestone/Firestone, Inc. Tire Prods. Liab. Litig.*, 288 F.3d 1012, 1018 (7th Cir. 2002) ("We do not for a second suppose that Indiana would apply Michigan law to an auto sale if Michigan permitted auto companies to conceal defects from customers[.]"). In *Randolph*, not surprisingly, the California court has decided that California statutes govern the claims of its residents, even though the defendant might have been located in Washington.

Even if we were to ignore the fact that these two cases were brought by the same lawyers on behalf of many millions of the same consumers, the juxtaposition of these two decisions illustrates the enormous problem the COA Opinion poses for Washington businesses. Those businesses will be subject to suit under the laws of other states, where those laws are seen by plaintiffs as more favorable than Washington's. At the same time, as a result of the COA Opinion the same companies will be subject to nationwide class action suits under

Washington law if plaintiffs believe Washington law is more favorable to their claims. Contrary to the COA Opinion, Washington has no interest in punishing a Washington business for conduct that is legal where it occurs and its effects are felt. *See Amicus Curiae Memorandum of the Chamber of Commerce*, pp. 9 – 10.

The COA Opinion thus sharply tilts the playing field against Washington companies because their competitors in other states do not face the same problem. As discussed in the Petition for Review, the Court of Appeals' Opinion is out of line with the prevailing authority on choice of law for statutory consumer protection claims. Petition for Review, pp. 15 – 17; *Amicus Curiae Memorandum of the Chamber of Commerce*, pp. 7-10.

The Court should also be aware of significant recent authority that runs counter to the COA Opinion on this point. In *Barbara's Sales, Inc. v. Intel Corporation*, 879 N.E. 2d 910 (Ill. 2007), the Illinois Supreme Court refused to apply California law to the claims asserted by a putative nationwide class, notwithstanding that the defendant was a California corporation. *Id.* at 918 – 919. Like Washington, Illinois follows the Second Restatement of Conflict of Laws. Contrary to the COA Opinion, however, the Illinois Supreme Court found that § 148 of the Restatement, which applies to claims of consumer deception, requires application of the law of the *consumer's* home state because that is where “plaintiffs both received and relied on the representations” made by Intel. *Id.* at 923. The Illinois court also rejected the view that California's interest in regulating

the conduct of its native companies outweighs the interests of the consumers' home states in protecting their citizens. Indeed, the court concluded, "California has no interest in extending its laws to noncitizens and to actions that occurred outside of California borders." *Id.* at 921.

The recent developments in *Randolph* also give rise to a number of other issues that affect the CR 23 analysis here. These issues were not considered by the Court of Appeals, nor were they present when the trial court decided Plaintiffs' motion for class certification. For example, the availability of other statewide class actions affects whether the nationwide class action here "is superior to other available methods for the fair and efficient adjudication of the controversy." CR 23(b)(3). Indeed, CR 23(b)(3)(B) specifically requires the trial court to consider whether other litigation concerning the controversy has been filed on behalf of class members.

Likewise, the following facts greatly complicate the issue of manageability of the class requested by Plaintiffs herein: (1) many of the putative class members here are also included in the class that has been certified in *Randolph*; (2) the arguments Plaintiffs make here as to choice of law are inconsistent with the arguments they are making in *Randolph*; and (3) both classes would be represented by the same lawyers. Finally, counsels' obligations to the *Randolph* class and their conduct in connection with the matters discussed herein raise anew the issue of whether they should be appointed as class counsel in this matter.

Petitioner respectfully suggests that the trial court should, in the first instance, consider the effect of these recent developments.¹⁰

IV. CONCLUSION

This Court should reverse the COA Opinion and remand the case to the trial court for further proceedings, taking into account the recent developments discussed herein as well as the Court's decision in *Indoor Billboard*.

DATED this 29 day of May, 2008.

KIPLING LAW GROUP PLLC

By: Michael E. Kipling
Michael E. Kipling, WSBA #7677

Counsel for Petitioner AT&T Wireless
Services, Inc.

FILED AS
ATTACHMENT TO
E-MAIL

¹⁰ The COA Opinion should be reversed and remanded in its entirety, including specifically the decision on the putative contract class. The Opinion fails to take in account several of the factors that led the trial court to deny certification of the contract claims. Petition for Review, pp. 17-20. Moreover, the recent developments discussed in this Supplemental Brief also affect the CR 23 analysis as to the contract claims and should be considered in the first instance by the trial court, rather than by this Court.

Exhibit A

RCB



6181071

David Breskin, Washington SBN 10607
Daniel Johnson, Washington SBN 27848
BRESKIN JOHNSON & TOWNSENT, PLLC
999 Third Avenue, Suite 4400
Seattle, Washington 98104-4088
(206) 652-8660

William Houck, Washington SBN 13324
HOUCK LAW FIRM, P.S.
4045 262nd Ave. SE
Issaquah, Washington 98029
(425) 392-7118

Hunter Pyle, Cal SBN 191125
SUNDEEN SALINAS & PYLE
1330 Broadway, Suite 1830
Oakland, CA 94612
(510) 663-9240

Attorneys for Plaintiffs
BROOKE RANDOLPH,
JOHN GIRARD,
and all others similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

BROOKE RANDOLPH and JOHN GIRARD,
on behalf of themselves and all others
similarly situated and as a private attorney
general on behalf of the members of the
general public residing within the State of
California,

Plaintiffs,

v.

AT&T WIRELESS SERVICES, INC., a
foreign corporation, and its successor in
interest, CINGULAR WIRELESS LLC, a
foreign corporation, and AT&T WIRELESS
SERVICES OF CALIFORNIA, INC., a
California corporation,

Defendants.

Case No. RG05193855

~~PROPOSED~~ ORDER GRANTING
APPROVAL OF FORM OF CLASS NOTICE;
PLAINTIFFS TO BEAR COST OF NOTICE

Date: March 21, 2008
Time: 2:00 p.m.
Dept: 20
Judge: Hon. Robert Freedman

Res.
No. R801485

~~PROPOSED~~ ORDER GRANTING APPROVAL OF CLASS NOTICE; PLAINTIFFS TO
PAY COST OF NOTICE

CASE NO. RG05193855

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INTRODUCTION

Plaintiffs Motion for Approval of Class Notice came on regularly for hearing in Department 20 of the above-captioned Court on March 21, 2008 at 2:00 p.m. Appearing for plaintiffs were David Breskin, William Houck, and Hunter Pyle. Appearing for defendants was Michael Kipling.

ORDER

The Court, having read and considered the pleadings and oral statements of counsel hereby rules as follows:

The Court GRANTS Plaintiffs' Motion for Approval of Class Notice.

1. The Court finds that Defendants had no objection to the final form and manner of Class Notice Proposed by Plaintiffs;

2. The Court finds that notice by publication is the best practical means of providing notice to the class;

3. The Court APPROVES Notice to the Class by means of newspaper publications and an internet website, as follows:

a. Notice to the Class shall consist of newspaper publications of 1/12th page length, one time per week for four weeks, to appear in the *Los Angeles Times*, the *San Francisco Chronicle*, the *Sacramento Bee*, and the *San Diego Union Tribune* and shall be in a form consistent with Exhibit 1 attached hereto;

b. This newspaper notice is an abbreviated notice and shall include the information mandated by Civil Code section 1781(e) and shall refer class members to the internet site, www.awsclassaction.com, for the full Notice contained in Exhibit 2;

c. Full Notice to the Class shall appear on the website located at www.awsclassaction.com and shall be consistent with Exhibit 2, attached hereto; and

d. The Court finds that the abbreviated notice and full notice include the information mandated by Civil Code section 1781(e) and provide the additional information specified by California Rule of Court 3.766(d).

~~PROPOSED~~ ORDER GRANTING APPROVAL OF CLASS NOTICE; PLAINTIFFS TO
BEAR COST OF NOTICE
CASE NO. RG05193855

4. Plaintiffs shall bear the cost of Notice to the Class associated with newspaper publications and an internet website, as specified above.

IT IS SO ORDERED.

April 18, 2003

~~HON. ROBERT FREEDMAN~~


**[PROPOSED] ORDER GRANTING APPROVAL OF CLASS NOTICE; PLAINTIFFS TO
BEAR COST OF NOTICE
CASE NO. RG05193855**

1 Approved as to form:

2
3 Dated:

April 17, 2008

By:


Hunter Pyle, Cal SBN 191125
SUNDEEN SALINAS & PYLE
1330 Broadway, Suite 1830
Oakland, CA 94612
510-663-9240

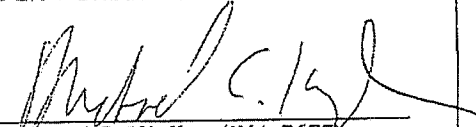
Attorneys for Plaintiffs

7
8 Dated:

April 16, 2008

KIPLING LAW GROUP PLLC

By:


Michael E. Kipling (WA 7677)
(admitted *pro hac vice*)

Ronald J. Kohut (SBN 66463)
Sarah K. Kohut (SBN 197655)
KOHUT & KOHUT LLP
3554 Round Barn Blvd., Suite 204
Santa Rosa, CA 95403
Tel: (707) 573-3100
Fax: (707) 573-3101

Attorneys for Defendants

27
28 [PROPOSED] ORDER GRANTING APPROVAL OF CLASS NOTICE; PLAINTIFFS TO
BEAR COST OF NOTICE
CASE NO. RG05193855

EXHIBIT 1

DANART Communications

AT&T/Randolph

Size: 2 cols x 5.25" (3 3/4" x 5 1/4") (1/12th Page)

10 pt font (12 point headline)

February 14, 2008

File Name: ATTRandolphPubNotice 1 12th Page 080214.doc

Legal Notice of Class Action

**If you were an AT&T Wireless Services Subscriber
between January 14, 2001 and
June 30, 2005 and paid a "Universal Connectivity
Charge" this notice may affect your rights.**

A lawsuit is pending in the Superior Court of Alameda County, California, called *Randolph v. AT&T Wireless Services, Inc. et al.*, Case No. RG05193855, in which the claims are made that AT&T Wireless Services charged California subscribers a monthly "universal connectivity charge" that was not in the service agreement and not disclosed pre-sale. AT&T Wireless Services denies these claims and contends that the charge was authorized by the agreement and was properly disclosed. This lawsuit does not involve Cingular Wireless or AT&T Mobility.

The court has certified the action as a class action on behalf of all California subscribers of AT&T Wireless Services who paid a "universal connectivity charge" between January 14, 2001 and June 30, 2005. If you received service from AT&T Wireless Services during this time period, you are likely a member of this Class.

You will remain a class member and be subject to any judgment rendered in the case, whether favorable or unfavorable, unless you ask the court to exclude you. The court will exclude you if you request it. If you do not exclude yourself, you will receive the benefit of any settlement or damages awarded in the case, and you may, at your own expense, hire a lawyer to appear in the case for you personally.

If you do not want to exclude yourself, you may do nothing at this time. If you do want to exclude yourself, go to www.awsclassaction.com to get an exclusion request form. The deadline for exclusion is May 28, 2008. If you want more information go to www.awsclassaction.com.

DO NOT CALL THE COURT OR
YOUR WIRELESS PHONE COMPANY.

EXHIBIT 2

Legal Notice of Class Action

If you were an AT&T Wireless Services Subscriber between January 14, 2001 and June 30, 2005 and paid a "Universal Connectivity Charge" this notice may affect your rights.

A lawsuit is pending in the Superior Court of Alameda County, California, that may affect your rights. The lawsuit claims that AT&T Wireless Services charged subscribers a monthly Universal Connectivity Charge that they were not obligated to pay under their agreements, and failed to disclose the Universal Connectivity Charge at the time they activated service. AT&T Wireless Services denies these claims and says that the Universal Connectivity Charge is a charge that is included in the subscriber agreements and was disclosed to subscribers. The Court has not decided whether the Class or AT&T Wireless Services is right. The lawyers for the Class will have to prove their claims at a trial. The lawsuit is called *Randolph v. AT&T Wireless Services, Inc. et al.*, Case No. RG05193855. This lawsuit does not involve Cingular Wireless or AT&T Mobility."

The Court decided this lawsuit should be a class action on behalf of a "Class," or group of people, that could include you. This notice summarizes your rights and options before a trial takes place. If you're included, you have to decide whether to stay in the Class and be bound by whatever results, or ask to be excluded and keep your right to sue AT&T Wireless Services yourself. There is no money available for you from this lawsuit now and no guarantee that there will be.

Are You a Member of the Class?

Class members are: All California subscribers of AT&T Wireless Services who were billed and paid a universal connectivity charge ("UCC") between January 14, 2001 and June 30, 2005.

In addition, the court has certified subclasses on breach of contract claims. These subclasses are: (a) All California subscribers who first contracted for services with AT&T Wireless Services prior to June 1, 2002, and were billed and paid a universal connectivity charge under an Agreement issued to them prior to February 1, 2003; (b) All California subscribers who first contracted for services with AT&T Wireless Services between June 1, 2002, and January 31, 2003, and were billed and paid a universal connectivity charge under an Agreement issued to them prior to February 1, 2003; (c) All California subscribers who were billed and paid a universal connectivity charge under an Agreement issued to them after February 1, 2003.

Who Represents The Class?

The law firms of Breskin Johnson & Townsend PLLC, of Seattle, WA; Houck Law Firm, P.S., of Issaquah, WA and

Sundeen Salinas & Pyle, of Oakland, CA, will represent you as "Class Counsel." If Class Counsel obtains money or benefits for the Class, they may ask the Court for fees and expenses. If the Court grants their request, the fees and expenses may be deducted from any money obtained for the Class, or paid separately by AT&T Wireless Services. You may, at your own expense, hire a lawyer to appear in the case for you personally.

What Are Your Options?

You have a choice of whether to stay in the Class or not, and you must decide this now. To stay in the Class, you do not have to do anything. If money or benefits are obtained, you will be notified about how to ask for a share. You will be legally bound by all orders and judgments of the Court, and you won't be able to sue, or continue to sue, AT&T Wireless Services as part of any other lawsuit about the legal claims resolved in this case.

If you exclude yourself, you cannot get any money or benefits from this lawsuit if any are awarded, but you will keep any rights to sue AT&T Wireless Services for the same claims, now or in the future, and will not be bound by any orders or judgments in this case. To ask to be excluded, fill out and send in the attached exclusion request post-marked by May 28, 2008.

EXCLUSION REQUEST

I want to be excluded from the *Randolph, et al. v. AT&T Wireless Services et al.* class action. I understand that if I exclude myself, I will not be able to get any money or benefits if any become available from this case, however, I will not be bound by any Court orders, and I will keep any rights I have to sue AT&T Wireless Services about the claims in this case, as part of any other lawsuit.

Name _____

Address _____

City _____

State _____

Zip _____

Telephone _____

SIGNED _____

DATE _____

If you want to be excluded, mail this form, postmarked by May 28, 2008 to: Rosenthal & Company LLC, 300 Bel Marin Keys Blvd., #200, Novato, CA 94949 Toll-Free: 1-800-211-5201

The above is a summary of the case. The pleadings and other records in this litigation may be examined (a) online on the Alameda County Superior Court's website, known as "Domain Web," at www.alameda.courts.ca.gov/courts, or (b) in person at Room 109 at the Rene C. Davidson Courthouse at 1225 Fallon Street, Oakland, California 94612, between the hours of 9:00 a.m. and 4:00 p.m., Monday through Friday, excluding Court holidays, or you may contact Class Counsel through Rosenthal & Company LLC, 300 Bel Marin Keys Blvd., #200, Novato, CA 94949 Toll-Free: 1-800-211-5201

**DO NOT CALL THE COURT OR YOUR
WIRELESS TELEPHONE COMPANY.**

Exhibit B

1 David Breskin, Washington SBN 10607
Daniel Johnson, Washington SBN 27848
2 SHORT CRESSMAN & BURGESS, PLLC
999 Third Avenue, Suite 3000
3 Seattle, Washington 98104-4088
(206) 682-3333

4 William Houck, Washington SBN 13324
5 HOUCK LAW FIRM, P.S.
4045 262nd Ave. SE
6 Issaquah, Washington 98029
(425) 392-7118

7 Hunter Pyle, Cal SBN 191125
8 SUNDEEN SALINAS & PYLE
1330 Broadway, Suite 1830
9 Oakland, CA 94612
(510) 663-9240

10 Attorneys for Plaintiffs
11 BROOKE RANDOLPH,
JOHN GIRARD,
12 and all others similarly situated

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
14 **IN AND FOR THE COUNTY OF ALAMEDA**

16 BROOKE RANDOLPH and JOHN
GIRARD, on behalf of themselves and all
17 others similarly situated and as a private
attorney general on behalf of the members of
18 the general public residing within the State
of California,

19 Plaintiffs,

20 v.

21 AT&T WIRELESS SERVICES, INC., a
22 foreign corporation, and its successor in
interest, CINGULAR WIRELESS LLC, a
23 foreign corporation, and AT&T WIRELESS
SERVICES OF CALIFORNIA, INC., a
24 California corporation,

25 Defendants.

Case No. RG05193855

**REPLY BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR CLASS
CERTIFICATION**

Date: May 3, 2007
Time: 2:00 p.m.
Dept: 20
Judge: Hon. Robert Freedman

26
27
28 **REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**
CASE NO. RG05193855

Table of Contents

	<u>Page</u>
I. LEGAL ARGUMENT	1
A. The Court Should Certify The Proposed Breach Of Contract Classes.	2
1. Plaintiffs' Principal Breach of Contract Claim Presents Two Common Questions That Predominate Over Any Individual Issues That May Arise.	2
a. AWS can identify which class members received which of the two Agreements.	3
b. AWS' attempt to incorporate additional terms into the Agreement presents common questions.	3
2. Extrinsic Evidence Is Irrelevant In Interpreting AWS's Standard Form Adhesion Contract.	4
3. The Court Should Certify Plaintiffs' Alternative Breach of Contract Claim.	6
B. The Court Should Certify a CLRA, FAL and UCL Class.	7
1. Causation Presents Common Questions.	7
a. Plaintiffs have presented common, class-wide evidence that the nature and amount of the UCC would have been material to a reasonable consumer.	8
b. Plaintiffs have presented common, class-wide evidence that the nature and amount of the UCC would have been material to a reasonable consumer.	9
2. There Is No Evidence That Any Class Member Was Informed About the UCC.	10
C. The Voluntary Payment Doctrine Does Not Defeat Class Certification.	12
D. Plaintiffs Have Shown That Class Certification Will Substantially Benefit The Court And The Litigants.	13
E. Plaintiffs Girard And Randolph Are Adequate Class Representatives.	14
F. Proposed Class Counsel Are Qualified to Represent the Class.	15

Table of Authorities

	<u>Page</u>
<u>California Cases</u>	
<i>Beck v. American Health Group Int'l</i> (1989) 211 Cal.App.3d	5
<i>Binder v. Aetna Life Ins. Co.</i> (1999) 75 Cal. App. 4th 832	5
<i>Blue Chip Stamps v. Superior Court</i> (1976) 18 Cal.3d 381	14
<i>Caro v. Proctor & Gamble Co.</i> (1993) 18 Cal.App.4th 644	10
<i>Consumer Advocates v. Echostar</i> (2003) 113 Cal. App. 4th 1351	8
<i>Discover Bank v. Superior Court</i> (2005) 36 Cal.4 th 148	14
<i>Employers Casualty Ins. Co. v. Foust</i> (1972) 29 Cal.App.3d 382	4
<i>Engalla v. Permanente Medical Group, Inc.</i> (1997) 15 Cal.4th 951	8,9
<i>Hogya v. Superior Court</i> (1977) 75 Cal.App.3d 122	13
<i>Lebrilla v. Farmers</i> (2004) 119 Cal.App.4th 1070	8,10
<i>Linder v. Thrifty Oil Co.</i> (2000) 23 Cal.4th 429	8,13
<i>Massachusetts Mutual v. Sup. Ct.</i> (2002) 97 Cal.App.4th 1282	7,8,10
<i>McGhee v. Bank of America</i> (1976) 60 Cal.App.3d 442	14
<i>Occidental Land, Inc. v. Superior Court</i> (1976) 18 Cal.3d 355	8
<i>Persson v. Smart Inventions Inc.</i> (2005) 125 Cal.App.4 th 1141	9
<i>Pfizer Inc. v. Superior Court</i> (2006) 141 Cal.App.4 th 290, review granted, 51 Cal.Rptr.3d 707	7

1	<i>Rader Co. v. Stone</i>	
2	(1986) 178 Cal.App.3d 10	6
3	<i>Santa Ana Hospital v. Belshe</i>	
4	(1997) 56 Cal. App. 4 th 819	1
5	<i>Sav-On v. Superior Court</i>	
6	(2004) 34 Cal.4th 319	3
7	<i>Shapell Industries, Inc. v. Superior Court</i>	
8	(2005) 2005 Cal.App.LEXIS 1470	15
9	<i>State Farm Fire & Casualty Co. v. Superior Court</i>	
10	(1996) 45 Cal.App.4th 1093	10
11	<i>Titan Group, Inc. v. Sonoma Valley County Sanitation Dist.</i>	
12	(1985) 164 Cal.App.3d 1122	2
13	<i>Vasquez v. Superior Court</i>	
14	(1971) 18 Cal.3d 355	10
15	<i>Wolschlager v. Fidelity National Title Ins. Co.</i>	
16	(2003) 111 Cal.App.4 th 784	4
17	<u>Federal Cases</u>	
18	<i>Anunziato v. eMachines, Inc.</i>	
19	(C.D.Cal.2005) 402 F.Supp.2d 1133	8
20	<i>Blackie v. Barrack</i>	
21	(9th Cir. 1975) 524 F.2d 891	8
22	<i>Doe v. Texaco</i>	
23	(N.D.Cal.2006) 2006 WL 2053504	7
24	<i>Holdings v. Mowbray</i>	
25	(1 st Cir.2000) 208 F.3d 288	11
26	<i>Laster v. T-Mobile USA, Inc.</i>	
27	(S.D.Cal.2005) 407 F.Supp.2d 1181	7
28	<i>TSC Industries, Inc. v. Northway, Inc.</i>	
29	(1976) 426 U.S. 438	9
30	<u>Other Cases</u>	
31	<i>Darner Motor Sales, Inc.</i>	
32	(Ariz. 1984) 682 P.2d 388, 398-99	5
33	<i>Schnall et al. v. AT&T Wireless Services, Inc.</i>	
34	(King County Superior Court No. 02-2-05776-4 SEA)	15
35	<u>California Statutes and Rules</u>	
36	Civil Code section 1781(b)	13

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

California Rule of Court 8.1115

1

Treatises

55 Cal. Jur. 3d, Restitution, section 12

12

55 Cal. Jur. 3d, Restitution, section 40

12

55 Cal. Jur. 3d, Restitution, section 44

12

Restatement (Second) of Contracts § 211

5

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. LEGAL ARGUMENT

AWS' Opposition fails to rebut the central argument of Plaintiffs' motion for class certification: that common questions of law and fact predominate with respect to Plaintiffs' claims.¹

The Court should therefore grant Plaintiffs' motion for the following reasons:

First, on the contract claim, Plaintiffs have proposed two subclasses: one consisting of those AWS California customers who had an Agreement that referred specifically to the UCC, and one of those who had an Agreement that did not. Plaintiffs' contract claim therefore presents common questions regarding the interpretation of two standard form contracts used with all California consumers. AWS has not presented any evidence that any class member understood his or her contract to include the UCC. Furthermore, because AWS did not separately negotiate these standard form contracts with class members, evidence regarding individual class members' knowledge and conduct with respect to them is irrelevant.

Second, on the consumer protection claims, the central issue is whether AWS' failure to disclose the nature and amount of the UCC would have been material to a reasonable consumer. This is an objective inquiry that presents a common, class-wide question. Both Plaintiffs and AWS have presented common, class-wide evidence on this issue. For that reason alone, the Court should certify a CLRA, UCL and FAL class. Furthermore, because the merits of this case are not presently before the Court, the Court should reject AWS' attempts to convert this motion into a "battle of the experts."

Finally, it is well-settled that the voluntary payment doctrine does not apply to claims sounding in misrepresentation, such as those presented here. Nor does it defeat Plaintiffs' breach of contract claim because AWS has presented no evidence that any consumer had "full knowledge" of the UCC. Moreover, AWS' complete failure to disclose what the UCC was and how much it would cost creates a predominant, class-wide question as to whether a consumer could have had full knowledge of the UCC.

¹ Preliminarily, AWS' citations to the unpublished opinion of a Washington trial court are improper and the Court should disregard them. See California Rule of Court 8.1115; *Santa Ana Hospital v. Belshe* (1997) 56 Cal. App. 4th 819, 831.

1 **A. The Court Should Certify The Proposed Breach Of Contract Classes.**

2 **1. Plaintiffs' Principal Breach of Contract Claim Presents Two Common Questions**
3 **That Predominate Over Any Individual Issues That May Arise.**

4 Plaintiffs' principal breach of contract claim alleges that the Agreement did not permit AWS
5 to charge the UCC. AWS contends that because some class members' Agreements include a
6 specific reference to the UCC and some do not, individual issues predominate with respect to this
7 claim. Opp. at 5:18-22. Plaintiffs have already addressed this contention by proposing two
8 subclasses, each of which presents a common question as to whether AWS was permitted to charge
9 the UCC, as follows:

10 During all relevant time periods, AWS used a standard form contract with each of its new
11 customers called the "Agreement." Prior to February 2003 the Agreement did not include a specific
12 reference to the UCC. Opp. at 4:25-28. The Court has already held that there is a triable issue as to
13 whether this Agreement permitted AWS to charge the UCC.² This issue is a common question for
14 the first subclass-all class members who entered into Agreements with AWS prior to February 2003.

15 In February 2003, AWS amended the Agreement so as to include a specific reference to the
16 UCC. Plaintiffs contend that this change in the language of the Agreement did not permit AWS to
17 charge the UCC.³ AWS disagrees. Opp. at 5:18-24. This disagreement creates a second common
18 issue for the second subclass-all class members who entered into Agreements with AWS after
19 February 2003. The interpretation of these two form contracts depends upon facts that are entirely
20 independent of the subjective understanding of any individual consumer. *See Titan Group, Inc. v.*
21 *Sonoma Valley County Sanitation Dist.* (1985) 164 Cal.App.3d 1122, 1127 ("It is the objective
22 intent, as evidenced by the words of the contract, rather than the subjective intent of one of the
23 parties, that controls interpretation.") Accordingly, common issues predominate.

24
25
26 ² Order, Johnson Decl., Exh. 7, p. 4. The Court has also already held that other differences in the
27 operative language of the Agreement prior to February 2003 are not material for the purposes of
28 resolving Plaintiffs' breach of contract claim.

³ Reply Declaration of David Breskin, ¶¶11-13.

1 AWS' additional arguments regarding Plaintiffs' contract claims are easily disposed of:

2 **a. AWS can identify which class members received which of the two**
3 **Agreements.**

4 AWS contends that it will be difficult to determine who got which Agreement. Opp. at 6:2-
5 15. However, AWS has represented to this Court in prior pleadings that it has the ability to
6 "pinpoint" when a particular class member received a particular new phone.⁴ AWS has also
7 represented that it has "stringent quality control mechanisms" for ensuring that each new phone
8 included the Agreement then in effect.⁵ As set forth above, the resolution of Plaintiffs' contract
9 claim will turn on class-wide determinations regarding the scope of the Agreement before and after
10 February 2003. If either version of the Agreement did not permit AWS to charge the UCC, then
11 AWS can determine which class members received that Agreement. It is well-settled that this type
12 of inquiry (whereby class members need to establish eligibility to receive damages) does not mean
13 that individual questions predominate. *Sav-On v. Superior Court* (2004) 34 Cal.4th 319, 334.

14 **b. AWS' attempt to incorporate additional terms into the Agreement**
15 **presents common questions.**

16 AWS contends that the Agreements were modified by rate plan brochures and other
17 promotional materials which the Agreement incorporated by reference.⁶ Opp. at 5:2-3.
18 Preliminarily, AWS has not identified any specific collateral documents that applied to any class
19 member. For this reason, its argument is pure speculation.⁷

20 ⁴ AWS' Reply Memorandum In Support Of Defendants' Motion To Compel Arbitration, filed on
21 August 18, 2005 ("Reply MPA") at 1:20-2:9.

22 ⁵ Reply MPA at 2:4-6.

23 ⁶ This assertion contradicts AWS' repeated assertions that the operative language of the Agreement
24 is found in the Terms and Conditions of Service. See Opp. at 4:21-24. AWS has offered no
25 evidence that the collateral documents were incorporated into this operative language. Nor does the
26 operative language refer to any of the collateral documents. Furthermore, AWS has failed to lay a
27 foundation for Mr. Fischer's testimony regarding the collateral documents because it has presented
28 no evidence that any of the materials he discusses were used in California at particular times.
Declaration of Chad Fischer, attached to the Declaration of Mike Kipling as Exhibit J ("Fischer
Dec."), ¶¶32, 33. Accordingly, there is no way to tell whether these materials are relevant to this
case.

⁷ Furthermore, if the Court credits the testimony of Chad Fischer regarding the dates that AWS used
certain Calling Plans and promotional materials, AWS first began including a specific reference to
the UCC in these documents in May 2002. (The exhibits that Mr. Fischer refers to from 1999
include only references to the UCC as a charge that was excluded from certain rates, and do not state
that the UCC will apply to a consumer's bill.) Fischer Dec., ¶31.

1 Furthermore, under California law, if AWS wishes to prove that the Agreements
2 incorporated other documents, it must show that the reference to these other documents in the
3 Agreements is "clear and unequivocal." *Wolschlager v. Fidelity National Title Ins. Co.* (2003) 111
4 Cal.App.4th 784, 790. The language that allegedly incorporates these additional documents into the
5 Agreement, which is the same for all class members, reads as follows:

6 The price, features and options of the Service available for each Identifier on your
7 Account depends on the calling, data or mobile Internet plan, feature or promotion
8 selected by you when you activated or changed your Service and are described in a
9 separate AT&T Wireless Calling Plan, Service Plan or Rate Plan ("Rate Plan"
10 Brochure, in feature or promotional materials, at att.wireless.com and/or in an AT&T
Wireless Welcome Guide (collectively, "Sales Information"), all of which are
incorporated by reference, are a part of this agreement and were available when you
activated or changed Service. To receive copies of Sales Information call Customer
Care.⁸

11 This presents a single, class-wide issue: Is the incorporation by reference clear and unequivocal
12 enough for the Court to find that the referenced documents should be incorporated into the
13 Agreements? This common issue predominates over any individual issues that may arise.

14 Even if the Court were to find that the Agreement incorporated collateral documents, the
15 issue it would create can be resolved through subclasses: One subclass of consumers whose contracts
16 included rate plan documents that mentioned the UCC and one subclass class whose contracts did
17 not.

18 **2. Extrinsic Evidence Is Irrelevant In Interpreting AWS's Standard Form**
19 **Adhesion Contract.**

20 AWS contends that the meaning of its standard, form, adhesion contract depends on extrinsic
21 evidence regarding each class member's conduct and/or state of mind when entering into the
22 contract. Opp. at 6:16-10:6. The Court should reject this contention because it is contrary to law,
23 the Restatement (Second) of Contracts, and common sense.

24 Under California law, courts interpreting standard form contracts seek to determine what a
25 "reasonable buyer" would expect them to mean. *Employers Casualty Ins. Co. v. Foust* (1972) 29
26 Cal.App.3d 382, 386 (holding that "Canons of construction dictate that courts interpret form
27 contracts to mean what a reasonable buyer would expect them to mean, thus protecting the weaker

28 ⁸ Declaration of Lauri Jordana in Support of Defendants' Motion to Compel Arbitration, Exh. A-I.

1 buyers' expectation at the expense of the stronger positioned draftsman."); *See also Beck v. American*
2 *Health Group Int'l* (1989) 211 Cal.App.3d 1555, 1562. Accordingly, the issue for the Court is what
3 a reasonable consumer would expect the Agreement to mean. This is a common question that can be
4 resolved on a class-wide basis.

5 The Restatement of Contracts sets forth this rule in a special provision for "**Standardized**
6 **Agreements**":

7 Such a writing is interpreted whenever reasonable as treating alike all those similarly
8 situated, without regard to their knowledge or understanding of the standard terms of
the writing.

9 Restatement (Second) of Contracts § 211(2).⁹ As the drafters explain, "A party who makes regular
10 use of a standardized form of agreement does not ordinarily expect his customers to understand or
11 even read the standard terms."¹⁰ One of the purposes of standardization is to eliminate bargaining
12 over details of individual transactions." *Id.*, cmt. b.

13 To hold otherwise would lead to an absurd result: Despite the fact that AWS drafted
14 standard form contracts to be used with millions of consumers, used these contracts with all class
15 members, intended for these contracts to be identical for each class member, and provided these
16 contracts to class members after the class member had signed up for service, the Court would be
17 holding that language in each identical contract could mean something different for each consumer.
18 "To apply the old rule and interpret such contracts according to the imagined intent of the parties is
19 to perpetuate a fiction which can do no more than bring the law into ridicule." *Darner Motor Sales,*
20 *Inc.* (Ariz. 1984) 682 P.2d 388, 398-99.

21 Additionally, the extrinsic evidence that AWS cites does not defeat class certification. First,
22 AWS' reference to the supposed conduct of class members (Opposition at 6:24-8:3) creates common
23 issues of law and fact. By definition, every class member received a bill with a UCC charge on it,

24
25
26 ⁹ Reply Declaration of David Breskin, Exh. 15. California courts often take guidance on contract
issues from the Restatement. *See Binder v. Aetna Life Ins. Co.*, 75 Cal. App. 4th 832, 859 n. 8.

27 ¹⁰ This is precisely the case here: Neve Savage, AWS' person most knowledgeable testified that
28 "most customers tell us they don't read material of that kind very often." Deposition of Neve Savage
(Breskin Reply Dec., Exh. 21) at 170:23-172:18.

1 and every class member paid the charge.¹¹ Therefore if voluntary payment is a defense, it applies to
2 all class members.

3 Furthermore, in order for such conduct to be relevant, the class members would have to
4 know what the UCC was. Here, AWS never disclosed to class members prior to contracting for
5 service what the UCC was or how much it would cost them. According to AWS's expert witness,
6 none of these consumers would have known what the UCC was.¹² Accordingly, the predominant
7 issue with regard to the conduct of the class members is a common issue that can be decided on a
8 class-wide basis.

9 Second, AWS's contention that consumers would have known about the UCC because they
10 had prior experience paying charges related to the Universal Service Fund is pure speculation. Opp.
11 at 9:12-23. AWS has presented no evidence that any class member had such knowledge, and the
12 fact that an individual had experience paying a USF charge would not inform him with respect to the
13 UCC. Wright Reply Dec., ¶12.

14 Finally, AWS's speculation about conversations at the point of sale is irrelevant. Opp. at
15 9:24-10:6. As set forth above, AWS has presented no evidence from any class member, employee,
16 or salesperson who claims that they discussed the UCC during a point of sale transaction.
17 Furthermore, such discussions are inadmissible because each Agreement contained an integration
18 clause rendering irrelevant any additional representations made by any representative, agent, or
19 dealer. Plaintiffs' Memorandum of Points and Authorities in Support of Motion ("MPA") at 5:1-2.

20 **3. The Court Should Certify Plaintiffs' Alternative Breach of Contract Claim.**

21 Plaintiffs' alternative breach of contract claim alleges that pursuant to all versions of the

22 ¹¹ AWS makes the same assertions in its attempt to invoke the voluntary payment doctrine, discussed
23 below in section I(C).

24 ¹² AWS' expert, Dr. Jerry Hausman, testified at deposition as follows: Q. Can you identify for me
25 any consumers that you believe knew what the UCC was when they paid it? A. Again, I'm saying
26 that I doubt that many consumers knew apart from some economists perhaps at Berkeley, Stanford,
27 and Fresno State, and colleges who might teach telecommunications. I doubt that many people
28 new what the UCC or the USF is. It's not something that's generally known. Again, I don't see
how that enters my opinion as an economist, but I will agree that I doubt that many people in
California outside of experts in telecommunications were those who perhaps worked for the
state regulatory agency would know what the UCC or the USF was. It's not the kind of thing
that people typically follow. Deposition of Jerry Hausman, attached to the Reply Declaration of
David Breskin as Exhibit 16, at 89:8-22. (emphasis added)

1 Agreement in effect during the class period, AWS was required to give advance notice each time
2 that it raised the amount of the UCC. See MPA at 6:9-15; 13:6-7. AWS contends that pleading this
3 theory of liability is improper because it assumes that AWS was entitled to charge the UCC to class
4 members. Opp. at 10:25-26. Yet it is well-settled that a plaintiff may plead alternative theories of
5 recovery. *Rader Co. v. Stone* (1986) 178 Cal.App.3d 10, 29.

6 The primary class consists of all customers who were billed and paid a universal connectivity
7 charge after January 14, 2001. This class therefore includes all alternative theory class members. It
8 is in both primary and alternative class members' interest for Plaintiffs to prevail on the primary
9 claim, because in that event all class members would recover all UCC monies that they paid to
10 AWS. In all cases, this amount will exceed the amount that alternative theory class members could
11 recover under the alternative claim.¹³

12 **B. The Court Should Certify a CLRA, FAL and UCL Class**

13 **1. Causation Presents Common Questions.**

14 AWS contends that in order for Plaintiffs to show causation, they must show that each class
15 member actually relied upon the alleged misrepresentations. Defendants' Opposition ("Opp.") at
16 11:15-18. The Court has already held that causation may be proven by materiality:

17 While it is undisputed that Plaintiffs have not alleged, nor presented evidence that
18 they relied on any false or misleading advertisements by AWS, the gravamen of their
19 claim is that AWS failed to disclose information regarding the UCC. Since causation
20 may be proven by materiality, creating the inference of reliance (see, *Massachusetts
Mutual Live Ins. Co. v. Sup. Ct.* (2002) 97 Cal.App.4th 1282, 1292-1293), *the issue is
whether the information that AWS failed to disclose was "material" to Plaintiffs'
decision to become subscribers to AWS's services.*

21 Order, Johnson Decl., Exh. 7, p. 3 (emphasis added). Thus, the central premise of AWS opposition
22 is directly contrary to the law of the case and to well-settled California law.¹⁴ As stated in *Mass.*

23
24 ¹³ Furthermore, under Plaintiffs' alternative claim, each class member suffered monetary damages
25 because he or she was required to pay more each month for his or her service than the contract
permitted. See Judicial Council of California Civil Jury Instructions (CACI) Instruction 303. A
26 plaintiff is not required to show that a breach of contract is material in order to recover damages.

27 ¹⁴ The California Supreme Court has granted review and depublished *Pfizer Inc. v. Superior Court*
28 (2006) 141 Cal.App.4th 290, review granted, 51 Cal.Rptr.3d 707. Accordingly, *Mass. Mutual*
controls because there are no published cases holding that a plaintiff must show actual reliance in
order to prevail on a FAL and UCL claim. Nonetheless, AWS attempts to rely on the *Pfizer*
analysis, citing *Laster v. T-Mobile USA, Inc.* (S.D.Cal.2005) 407 F.Supp.2d 1181, 1194, though that
case did not involve class certification, and *Doe v. Texaco* (N.D.Cal.2006) 2006 WL 2053504, which

1 *Mutual*, the requirement of proving causation under the CLRA "does not make the plaintiffs' claims
2 unsuitable for class treatment [because] '[c]ausation as to each class member is commonly proved
3 more likely than not by materiality.'" 97 Cal. App. 4th at 1292 (quoting *Blackie v. Barrack* (9th Cir.
4 1975) 524 F.2d 891, 907, fn. 22).¹⁵

5 Furthermore, it is well-settled that the test for materiality is an objective one, determined by a
6 reasonable consumer standard. *Consumer Advocates v. Echostar* (2003) 113 Cal. App. 4th 1351,
7 1361 (adopting reasonable consumer standard for UCL and CLRA claims). This test does not
8 depend upon individualized questions regarding each plaintiff. See *Occidental Land, Inc. v.*
9 *Superior Court* (1976) 18 Cal.3d 355, 363, n. 6. For these reasons, materiality is a common question
10 that can be resolved on a class-wide basis.¹⁶

11 **a. Plaintiffs have presented common, class-wide evidence that AWS' failure**
12 **to disclose the UCC was a material omission.**

13 Here, Plaintiffs have presented common, class-wide evidence that AWS' failure to disclose
14 the nature and amount of the UCC was material. See MPA at 22:7-23:17; see also Wright Reply
15 Dec., ¶¶3-7; Roycroft Reply Dec., ¶¶3-7. Plaintiffs' experts will testify that even small differences in
16 price were a substantial factor in consumer decision-making in general, and particularly in the highly
17 price-sensitive wireless phone services market during the class period, in which carriers' offerings
18 were considered fungible and price was the overriding determinant. See Wright Dec., ¶ 9; Roycroft
19 Dec., ¶¶ 13-17.

20 is based entirely on *Pfizer*. AWS fails to acknowledge the contrary federal authority, *Anunziato v.*
21 *eMachines, Inc.* (C.D.Cal.2005) 402 F.Supp.2d 1133, 1137-1138, which concluded that Proposition
22 64 did not import a showing of actual reliance into the FAL and UCL.

23 ¹⁵ This analysis in *Mass. Mutual* pertained to the CLRA, which has always required a showing of
24 causation. *Id.* at 1292. The court addressed the UCL and FAL separately, and applied the well-
25 established rule that relief under those statutes did not require any showing of causation. *Id.* at 1289.
26 While Proposition 64 subsequently imposed a standing limitation under the UCL and FAL that
27 requires a showing of injury to the plaintiff, it expressly limited that requirement to the named
28 plaintiff. Bus. & Prof. Code §§ 17203, 17535. It did not add a requirement of showing causation for
class members. *Id.* (empowering courts to award restitution to restore money or property "which
may have been acquired by means of [an unlawful] practice" (emphasis added)). Accordingly, even
after Proposition 64, plaintiff need not show that class members (as opposed to named plaintiffs)
suffered injury in fact. See *Mass. Mutual*, 97 Cal.App.4th at 1289.

¹⁶ The test for materiality is normally a question of fact to be decided by the jury. *Engalla*, 15 Cal.
4th at 977. Accordingly, the Court should not attempt to resolve this issue in the context of the
instant motion.

1 AWS disagrees with this evidence and attempts to convert this motion into a battle of the
2 experts regarding the merits of Plaintiffs' claims. Opp. at 15-16. AWS' expert contends that, while
3 price is indeed a key factor in consumer choice, the amount of the UCC was too small to be material.
4 Opp. at 16-17. Plaintiffs' experts disagree.¹⁷ However, this is neither the time nor the place to
5 resolve this dispute. "[I]t is well-settled that the question of certification is essentially a procedural
6 one that does not ask whether an action is legally or factually meritorious." *Linder v. Thrifty Oil Co.*
7 (2000) 23 Cal.4th 429, 439-440. Furthermore, the Court should not attempt to resolve the issue of
8 which experts are more convincing in the context of this motion. *Lebrilla v. Farmers* 119
9 Cal.App.4th 1070, 1084 ("it is not our role, nor the trial court's job, to involve ourselves with the
10 merits of the underlying action or which parties' experts are most qualified").

11 **b. Plaintiffs have presented common, class-wide evidence that the nature**
12 **and amount of the UCC would have been material to a reasonable**
13 **consumer.**

14 Notwithstanding *Mass. Mutual* and the well-established distinction between proving reliance
15 and proving materiality, AWS contends that these terms mean the same thing, i.e., that to prove
16 "materiality" Plaintiffs must prove that a reasonable consumer would have made a different choice if
17 he or she had known the truth. Opp. at 16:1-2. This contention is both mistaken, and, for the
18 purposes of this motion, irrelevant.

19 First, as this Court has indicated, "materiality" permits an inference of reliance and causation
20 "even in the absence of testimony from either plaintiff that they would have behaved differently if
21 the information regarding the UCC had been fully disclosed." Order, Johnson Decl., Exh. 7, p. 3;
22 *see also Mass. Mutual*, 97 Cal. App. 4th at 1293. The California Supreme Court has held that a
23 misrepresentation is material if a reasonable person would attach importance to its existence or
24 nonexistence in determining his or her course of action. *Engalla v. Permanente Medical Group, Inc.*
25 (1997) 15 Cal.4th 951, 976-77; *see also Persson v. Smart Inventions Inc.* (2005) 125 Cal.App.4th
26 1141, 1163; *TSC Industries, Inc. v. Northway, Inc.* (1976) 426 U.S. 438, 449.¹⁸ As set forth above,

27 ¹⁷ Wright Reply Dec., ¶¶3-7; Roycroft Reply Dec., ¶¶3-7.

28 ¹⁸ Thus, a misrepresentation is material if it plays a substantial part in influencing a person's
decision. *Engalla*, 15 Cal. 4th at 977; *see also Mass. Mutual*, 97 Cal.App.4th at 1293 (burden is to
show that omitted information "would have been material to any reasonable person contemplating

1 Plaintiffs have met this test.

2 Second, Plaintiffs have presented evidence that full disclosure of the UCC would have led
3 reasonable consumers to choose other providers. Roycroft Reply Dec., ¶¶14, 16; Wright Reply
4 Dec., ¶16. As set forth above, the Court should not attempt to determine which experts are more
5 convincing in the context of this motion. *Lebrilla* 119 Cal.App.4th at 1084. Instead, because
6 materiality, and thus causation, is an objective issue, and because the evidence that both Plaintiffs
7 and AWS¹⁹ will present on the issue of materiality is common to all class members, the Court should
8 certify the CLRA, UCL and FAL class.

9 **2. There Is No Evidence That Any Class Member Was Informed About the UCC.**

10 AWS attempts to manufacture "individualized" issues by arguing that "a vast amount of
11 accurate information regarding the UCC" was available to customers prior to the time that they
12 activated service. Opp. at 12:10-12. This is exactly the same contention the defendant made in
13 *Mass. Mutual*, and the court rejected.

14 Here, unlike the situation we considered in *Caro*, there is no evidence any significant
15 part of the class had access to all the information the plaintiffs believe they needed
16 before purchasing N'Pay premium payment plans. Indeed, there is nothing in the
17 record which shows that [that information] was disclosed to any class member. If
18 [that information] was material, an inference of reliance as to the entire class, subject
19 to any rebuttal evidence Mass Mutual might offer. *Mass. Mutual*, 97 Cal. App. 4th at
20 1295.

21 Thus the *Mass Mutual* court distinguished *Caro v. Proctor & Gamble Co.* (1993) 18
22 Cal.App.4th 644, because in that case, the information that plaintiffs contended was

23 the purchase of [defendant's product]" (emphasis added)). The use of "reliance" as shorthand for
24 causation comes from *Vasquez v. Superior Court* (1971) 18 Cal.3d 355, 363, which involved a
25 common law fraud claim, not a statutory consumer protection claim. *Mass. Mutual*, 97 Cal.App.4th
26 at 1293. Fraud under the UCL "bears little resemblance to common law fraud" because the burden
27 of proof is less stringent. *State Farm Fire & Casualty Co. v. Superior Court* (1996) 45 Cal.App.4th
28 1093, 1105.

19 Most of AWS's "evidence" on the issue of materiality is common to the entire class, including: (1)
That class members had 30 days to cancel their service (Opp at 14:5-13); (2) That Customer Care
representatives were trained to handle questions regarding the UCC (Opp at 14:9-13); (3) That "most
if not all" other carriers collected similar line item charges (Opp at 14:16-18); (4) That the FCC
created notices and materials regarding the UCC (Opp. at 14:23-26); (5) That there was significant
press coverage of the UCC (Opp. at 14:27-15:2); (6) That the UCC had no effect on relative prices
(Opp. at 17:1); and (7) That the UCC did not determine consumer choice (Opp. at 17:3-7). This
evidence, to the extent it is admissible, is common to the class, and reinforces the conclusion that
common questions predominate with respect to the issue of materiality.

REPLY MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

CASE NO. RG05193855

Page 10

1 concealed—whether the defendant's juice was "fresh" or from concentrate—was actually
2 disclosed on the product label, creating individual issues concerning who had seen the
3 information. 97 Cal. App. 4th at 668-69.

4 Here, Plaintiffs contend AWS should have disclosed the amount of the UCC, how it
5 was calculated, and the fact that it was a discretionary charge imposed by AWS. Just like
6 Mass. Mutual, AWS has not offered any evidence that "any significant part of the class had
7 access to" this information when they signed up for service, nor any evidence that this
8 information "was disclosed to any class member."

9 AWS cannot defeat class certification based on speculation and conjecture about evidence
10 that does not exist. *See Mass. Mutual*, 97 Cal.App.4th at 1295 (where there is no evidence
11 individual class members received disclosures, class certification proper); *see also Waste Mgmt.*
12 *Holdings v. Mowbray* (1st Cir. 2000) 208 F.3d 288, 299-300 (rejecting speculation as basis for
13 denying class adjudication). First, AWS has presented no evidence that any consumer saw or
14 received an advertisement, brochure, or other written marketing material that mentioned the UCC.
15 Moreover, none of these documents disclosed the nature or amount of the UCC. Accordingly, unlike
16 the advertisements at issue in *Caro*, none of AWS' materials disclosed the information that Plaintiffs
17 allege AWS omitted.

18 Second, AWS asserts that some consumers may have been provided full disclosure about the
19 UCC orally, at the point of sale. Opp. at 13:3-14:2. However, AWS has presented no evidence from
20 a class member, employee, or salesperson who claims that they discussed the UCC during a point of
21 sale transaction.²⁰ Indeed, it is highly unlikely that they could ever do so, as the employees who
22 have actually testified on the subject, including retail store managers and the Vice President of
23 Marketing, said they did not even know what the UCC was.²¹

24 ²⁰ AWS contends that "[Certain] customers also received information regarding the UCC and their
25 other obligations at the point of sale." Opp. at 13:22-23. However, the evidence that AWS cites
26 does not support this contention. Specifically, the Tally Declaration (Kipling Decl., Exh. D) at 392-
393 is silent with respect to any purported disclosures of the UCC. Likewise, the Pruzan Declaration
(Kipling Decl., Exh. H) at 471 does not describe any point of sale disclosures regarding the UCC.

27 ²¹ Deposition of Angelo Suarez (Breskin Reply Dec., Exh. 17) at 71:5-72:5; Deposition of William
28 Barclay (Breskin Reply Dec., Exh. 18) at 26:19-28:3; Deposition of Neve Savage (Breskin Reply
Dec., Exh. 21) at 58:16-60:16.

1 Third, AWS surmises that some class members may have noticed the UCC on their first bill
2 and, during the initial cancellation period, called a Customer Care representative with a question
3 about the UCC and received full and accurate information. Opp. at 14:9-13.²² Again, AWS has
4 presented no actual evidence that this ever happened.

5 Finally, AWS contends that class members had access to "other sources of information about
6 the UCC." Opp. at 14:15-15:2. The "other information" to which AWS refers is information from
7 other carriers, the FCC, and the media about the Universal Service Fund. AWS presents no evidence
8 that any class member actually received any information from these sources.²³ Furthermore, because
9 AWS changed the name of its Universal Service Fund charge to the Universal Connectivity Charge,
10 reasonable consumers had no reason to think that the UCC was in any way related to the USF.

11 Because common issues will predominate, the Court should certify the proposed classes.

12 **C. The Voluntary Payment Doctrine Does Not Defeat Class Certification.**

13 Under California law, the voluntary payment doctrine does not apply to claims sounding in
14 either misrepresentation or false representation. 55 Cal. Jur. 3d Restitution, §§ 12, 40 (2005).²⁴
15 Therefore, AWS' assertion of the voluntary payment defense presents a common, class-wide
16 question: do Plaintiffs' FAL, UCL and CLRA claims sound in misrepresentation or false
17 representation? Since they obviously do,²⁵ the voluntary payment doctrine does not apply to these
18 claims and can be dismissed by this Court on a class-wide basis.

19 With respect to Plaintiffs' contract claims, the voluntary payment doctrine only applies to
20 persons who have "full knowledge of the facts." 55 Cal. Jur. 3d Restitution, § 44 (2005). AWS has
21 presented no evidence that any class member had full knowledge of the facts with respect to the

22 ²² At any rate, evidence to this effect would say little or nothing because by that time, the class
23 member would already have selected his or her plan, received his or her phone and number, and used
24 the phone and disseminated the number to others, effectively mitigating any practical choice to
switch carriers.

25 ²³ The exception is AWS' assertion that "most if not all" other carriers charged a USF charge during
26 the class period. AWS has presented no admissible evidence in support of this assertion.
27 Furthermore, such evidence would not create an individual issue because it is assertedly true of
virtually all class members. See Opp. at 9:19 (unsupported claim that 95% of Californians were
charged USF charge).

28 ²⁴ Reply Declaration of David Breskin, Exh. 23.

²⁵ See First Amended Complaint at ¶¶39, 40, and 48.

1 UCC. AWS purposely chose an obscure name for the UCC and disguised the UCC in its billing
2 statements as a tax. Wright Reply Dec., ¶12. Furthermore, AWS did not inform any class members
3 about the nature or amount of the UCC in any of its printed materials. This creates a common, class-
4 wide issue regarding whether any class members had full knowledge of the UCC.²⁶

5 **D. Plaintiffs Have Shown That Class Certification Will Substantially Benefit The Court**
6 **And The Litigants.**

7 AWS contends that the Court should not certify a class in this case because the average
8 amount that each Class Member will receive will be less than \$9, and therefore not a substantial
9 benefit to class members. Opp. at 23:7-13. Preliminarily, under the CLRA, Plaintiffs are not
10 required to show "substantial benefits" to certify a class. See Civil Code section 1781(b).
11 Furthermore, it is reversible error for a court to import such a requirement into the CLRA. *Hogya v.*
12 *Superior Court* (1977) 75 Cal.App.3d 122, 131, 140.

13 Moreover, AWS' argument assumes that each class member would be entitled to a maximum
14 of 12 months of damages.²⁷ However, there is no basis for the Court to limit individual class
15 members' in this drastic manner: If plaintiffs are successful in their claims, class members will be
16 entitled to recover all of the money that they paid for UCC charges during the class period.
17 Additionally, class members will also be able to recover interest and, potentially, punitive damages.
18 AWS collected \$180,000,000 (one hundred and eighty million dollars) from class members during
19 the class period. This amount vastly exceeds the costs of notice and administering any judgment in
20 this case.

21 Finally, AWS misstates the law with respect to the definition of the term "substantial
22 benefits." In *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 434-35, the California Supreme Court

23 ²⁶ AWS also contends that "arbitration" poses individualized issues, despite the fact that the Court
24 previously found both AWS arbitration clause and Cingular's arbitration clause to be unconscionable
25 under California law. It apparently asks the Court now to validate a third clause which did not even
26 exist when they moved to compel arbitration in this case. The new clause still prohibits class
27 actions, the principal defect in the earlier versions. AWS cannot be permitted to evade the law of the
28 case (which was affirmed on appeal) concerning arbitration by simply re-revising the
unconscionable provisions in the contract and asking the Court to find that it creates "individual
issues." Arbitration is not a renewable escape hatch through which a culpable defendant can
continue to avoid adjudication of the claims against it.

²⁷ AWS assumes without basis that each class member would only be entitled to damages "up to the
point at which he or she chose to renew her agreement." Opp. at 23:9-10.

1 reversed a trial court that had denied class certification because the potential monetary recovery per
2 class member was very small (approximately 80 cents). The Court explained that "it is firmly
3 established that the benefits of certification are not measured by reference to individual recoveries
4 alone," but also include "several salutary by-products, including a therapeutic effect upon those
5 sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing
6 illegitimate competition, and avoidance to the judicial process of the burden of multiple litigation
7 involving identical claims."

8 The *Linder* court also limited the holding in *Blue Chip Stamps v. Superior Court* (1976) 18
9 Cal.3d 381 to the facts of that case and noted that "since *Blue Chip Stamps* was decided, we have
10 affirmed the principle that defendants should not profit from their wrongdoing 'simply because their
11 conduct harmed large numbers of people in small amounts instead of small numbers of people in
12 large amounts.'" 23 Cal.4th at 446.

13 In this case, it is unlikely that individual AWS consumers are going to bring claims to
14 recover their UCC payments. Accordingly, a class action is the only realistic way to handle these
15 claims. See *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 161. Moreover, to bar a class
16 action in this case because the individual recoveries will be relatively small would result in a huge
17 unjust advantage to AWS. Conversely, if Plaintiffs are successful, California consumers will
18 potentially recover \$180,000,000 that was unlawfully taken from them. For each of these reasons,
19 class certification will substantially benefit the class members as well as the Court.

20 **E. Plaintiffs Girard And Randolph Are Adequate Class Representatives.**

21 Adequacy of representation depends on whether the plaintiffs' claims are typical of the
22 claims sought to be asserted on behalf of the classes, and whether their interests are antagonistic to
23 the interests of the class. *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450. Here, as set
24 forth in Plaintiff's MPA at 14:5-15 and 21:15-18, both Plaintiff Girard and Plaintiff Randolph have
25 claims that are typical of the class claims. Furthermore, AWS has made no showing that either
26 plaintiff has interests that are antagonistic to the interests of the Class. Nor can it: Plaintiff
27 Randolph has never been involved in the *Schnall* action, and Plaintiff Girard is no longer involved in
28 it, having entered a voluntary dismissal of his claims in that matter. Moreover, the fact that Plaintiff

1 Randolph heard about this case from a family friend who had some involvement in *Schnall* does not
2 render her interests antagonistic to the Class interests. For these reasons, the Court should find that
3 Plaintiffs are adequate class representatives.

4 **F. Proposed Class Counsel Are Qualified to Represent the Class.**

5 AWS contends that Plaintiffs' counsel will not adequately represent the Class because
6 Plaintiffs' Washington counsel represent a putative nationwide class action in another case, *Schnall*,
7 *et al. v. AT&T Wireless Services*. Opp. at 23:20-24:24. First, AWS overlooks the fact that Mr. Pyle
8 has no involvement in the *Schnall* case. AWS has not opposed Mr. Pyle serving as class counsel in
9 this case. Second, in the event that the Court certifies a California class in this case, Plaintiffs'
10 Washington counsel will take the following steps to ensure that they do not represent a class of
11 AWS's California consumers in *Schnall*:²⁸ (1) they will formally withdraw as counsel for any
12 named plaintiff in *Schnall* who is in the California class; (2) they will seek to amend the pleadings in
13 *Schnall* as soon as reasonably possible to state that the nationwide class does not include AWS's
14 California customers; (3) they will not seek to certify a class in *Schnall* that includes AWS's
15 California customers; and (4) they will not seek in *Schnall* to settle or otherwise resolve the claims
16 of AWS' California customers.²⁹ These measures will ensure that Mr. Breskin, Mr. Johnson and Mr.
17 Houck do not have a conflict of interest with respect to the *Schnall* case.

18
19 Dated: April 26, 2007

SUNDEEN SALINAS & PYLE

20 By: 

Hunter Pyle

21 Attorneys for Plaintiffs
22 BROOKE RANDOLPH,
23 JOHN GIRARD,
24 and all others similarly situated

25 ²⁸ Lawyers in class actions represent both the named plaintiffs and putative absent class members.
26 *Shapell Industries, Inc. v. Superior Court* (2005) 2005 Cal.App.LEXIS 1470. Mr. Breskin, Mr.
27 Johnson and Mr. Houck are the only attorneys representing named plaintiffs in the *Schnall* action.
Accordingly, Mr. Breskin, Mr. Johnson and Mr. Houck can represent to the Court that they will
represent the California absent class members in this case and not in *Schnall*.

28 ²⁹ Reply Declaration of David Breskin, ¶¶3-4.